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Issues and Options: IX

A. The Problem. What should be the DCI's responsibility for providing substantive intelligence to the Congress?

B. Congressional Positions

1. The Senate Select Committee has taken no position on this issue, but its staff is ideologically devoted to the concept of Congress as co-equal with the Executive Branch in the foreign policy field. It is therefore quite possible that the Committee will assert the right of Congress to full access to all intelligence provided the Executive.
2. The House Select Committee has so far shown no interest in this issue.
3. Among the Standing Committees of Congress, only the Senate Foreign Relations Committee has aggressively asserted a right to full access.

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4. At least two bills introduced in the Senate this year deal with the general question of Congress' right to information. Neither specifically mentions CIA, ~~both~~ <sup>both</sup> ~~assert~~ <sup>assert</sup> that it is every Federal agency's obligation to keep congressional committees fully and currently informed with respect to all matters relating to that agency which are within the jurisdiction of that committee. Such a directive could certainly be construed to include CIA substantive intelligence. The only recent bill of note which dealt specifically with CIA was the Cooper bill, introduced in the 92nd Congress (1971-72). This bill amended the National Security Act to make CIA responsible for keeping the Armed Services and Foreign Relations Committees of each House fully and currently informed regarding intelligence collected concerning foreign relations and national security. The bill was passed by the Senate Foreign Relations Committee but was then referred to the Armed Services Committee, where it died.
5. Whether there will be a serious Congressional initiative in this area is still uncertain. Many key members appear satisfied with the

Amendment  
to FIA Act?

situation as it is. Others would simply not want to challenge the Executive on such an issue. If, however, this issue became entangled with the larger and more emotional ones concerning Legislative-Executive relations, the chances of statutory action would increase sharply.

C. Background

1. In the years since 1945 intelligence has become an essential element of the national policy-making process. Congress as well as the Executive has come to realize that it needs intelligence if it is to do its job properly, and there has been a steadily increasing volume of Congressional requests for intelligence information. Because this requirement developed gradually, over a period when Congress and the Executive were in basic agreement on the goals and conduct of national security policy, little consideration was given to the fundamental dilemma that Congressional intelligence requirements pose.

2. In recent years, however, with Congress and the Executive at odds over a broad range of issues, the dilemma has emerged to confront both sides. Good intelligence is objective and independent of policy considerations; it is prepared as one input to Executive policy-making. But the Executive must take into account other considerations, often political, as well. Thus the policy decided upon is many times not the one that would follow logically from the intelligence alone. Moreover, policies regularly run into trouble, and intelligence must report the bad news. Thus intelligence prepared to serve the Executive can be used politically by Congress as ammunition against the Executive. There are several ways to avoid this problem, all bad.

--The DCI could withhold selected information from the Congress when he believed it did not support the Executive's position. This would be a clear betrayal of his professional trust.

--The Executive could deny information to the DCI in order that it not fall into Congressional hands. This would cripple the national intelligence system and deprive the Executive of an objective voice in its councils.

--Or, Congress could develop its own intelligence support. This is, of course, reductio ad absurdum, but would follow logically from a Congressional assertion of equality in the formulation of foreign policy and an Executive denial of the right of Congress to Executive intelligence. (There is, after all, a Congressional Budget Office). It should be noted that a Congressional intelligence entity could range from a minimal capability to provide an independent check on Executive intelligence conclusions to a full-scale collection effort. The last is obvious nonsense, but the first might under certain circumstances appeal to many Congressmen and to the public.

3. The overall position and authority of the DCI depend on his being a member of the President's national security team, along with the senior officers of State and Defense. He must take part in the deliberations of the NSC and its subcommittees. He must have, and be seen to have, the confidence of the President. But if his colleagues in the Executive come to see him as having mixed loyalties,

in effect "a spy for Congress", he will quickly be disinvited or bypassed and his usefulness to the Executive will be ended. That no man can serve two masters is a cliché; it is also true.

4. There is no "solution" to this problem, only uneasy compromise. Any compromise, however, must maintain the principle that the DCI's primary loyalty and responsibility is to the Executive.

#### Legal Basis

5. The difficulty of the DCI's position stems from the fact that executive privilege is qualified in respect to intelligence. The President is given primary responsibility under the Constitution in the conduct of foreign relations. He therefore has an interest in protecting the process by which Executive decisions on foreign relations and other matters are formulated. Thus he is entitled to at least a qualified privilege from disclosing to Congress sensitive information reflecting the advisory opinions, recommendations and deliberations of his subordinates which comprise the decisionmaking process.

6. Intelligence necessarily involves the weighing of evidence and therefore in one context can be considered advisory in nature. Even purely factual intelligence is indicative of an executive branch opinion as to what specific facts are indeed important and relevant. A qualified privilege, however, is one which can be defeated by an overriding competing interest. Thus the applicability of the privilege to any particular form of intelligence depends on balancing the interest of the Executive in not inhibiting the free flow of information from subordinates, with the interest of Congress in obtaining intelligence in support of its foreign relations responsibilities.
7. Traditionally, the President has reserved the ultimate decision as to whether to invoke Executive privilege and has exercised this privilege only in the most compelling circumstances and after vigorous inquiry into the actual need for its exercise. The basic policy has been to comply to the fullest extent possible with congressional requests for information and to avoid a Constitutional confrontation. Of course, it is the initial responsibility of the

head of an Executive agency to which a request is directed to determine whether a substantial question as to the need for invoking Executive privilege has been raised.

The Present Situation

8. Under these constraints, the traditional position of the DCI was that he would be responsive within limits to Congressional requests but had no positive responsibility to volunteer information. (Exception was often made to ensure that the Oversight Subcommittees heard of particular developments from the DCI before they heard of them elsewhere). The DCI dealt with Congressional requests ad hoc, modulating his response to the sensitivity of the issue and the policy views of the requester. When he saw a danger of being put in the middle, he could usually invoke the authority of his Subcommittee Chairman to turn off the request. This approach worked reasonably well. It was able to accommodate increasing Congressional needs while avoiding in all but a few instances putting the DCI cross-ways with the Executive.



9. The present DCI's approach is necessarily

different. His Chairmen no longer have the power to protect him, the volume of Congressional requests continues to rise, and differences between the two Branches over foreign policy are intense. Moreover, this DCI has enunciated the principle that an American intelligence system must serve the entire nation, and specifically both Branches. In accord with this principle he has been more willing to volunteer information, and in particular he has offered the National Intelligence Daily, to the Armed Services, Foreign Affairs, and Appropriations Committees of both Houses. Most have accepted the offer, and the basic dilemma has quickly emerged. The Daily is prepared for the senior policy officers of the Executive and contains much sensitive intelligence. A Congressman used an item from it to challenge the Secretary of State's handling of an issue. The DCI began to feel pressure not to publish certain items, and was urged to withdraw the Daily from Congress. He tried,

but several Committees strongly objected. At present an effort is being made to substitute another publication prepared expressly to meet Congressional interests (and to avoid policy pitfalls) but there is some question whether Congress, once given red meat, will settle again for chicken. On the other hand, if it came to issue, a strong claim of executive privilege with regard to the Daily could be made based on its intended audience and close relationship with policy-making.

Some other Considerations

10. Although the DCI's right to maintain necessary secrecy for intelligence information and operations is very much a current issue, for the purpose of this paper it is assumed that intelligence provided to Congress will be properly safeguarded. It is obvious, however, that the more intelligence is provided, and the more Congressmen it is provided to, the greater the danger of compromise.

11. The provision of briefings to Congress on request makes only modest demands on the DCI's resources, and the provision of finished intelligence prepared for other purposes makes virtually none. Under present budgetary constraints, however, there are no resources available to meet Congressional requests for original work. Acceptance of an obligation to meet Congressional requests that require more than drawing on the bank of completed research must be weighed against the degradation in service to the Executive that this would cause.
12. Any policy on intelligence support to Congress must apply to all agencies of the Community. This paper assumes that the DCI of the future will have increased authority over the Community and will be able to set and enforce such a policy. It should be recognized, however, that in any case senior officials outside the Community will continue to leak intelligence selectively to Congress for their own purposes.

13. In the light of all of the above, the full range of options would appear to be:

- a. Revert to the system of the 50's and 60's: improvise and never--well, hardly ever--volunteer.
- b. Retreat somewhat from the present arrangement: continue to be relatively forthcoming in response to requests and substitute for the Daily\* a current intelligence publication designed especially for Congress as we are now seeking to do.
- c. Option b, plus automatic provision of routine intelligence production, but not sensitive materials such as the Daily, to appropriate Committees.
- d. Option d, but allow these sensitive materials to be examined by a much smaller and more discreet group than at present, e.g., a Subcommittee of a Joint Committee.

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\* The Daily symbolizes a category of policy-oriented intelligence that also includes National Estimates, etc.

- e. The present arrangements: be forthcoming in general; provision of sensitive information, i.e. the Daily, to a limited group.
- f. Accept the principle of full Congressional access under whatever arrangements the Congress may establish.
- g. Come full circle: deny that principle and establish a Congressional intelligence agency.

#### Conclusions

14. It would appear that our major objective should be to:

- Maintain the principle that our primary responsibility is to the Executive.
- Achieve Congressional acceptance of the principle that some intelligence is in fact privileged (and specifically retrieve the Daily).
- In general, minimize the number of people to whom intelligence is exposed.
- Avoid legislation. Any legislation would further complicate an already difficult situation and could force a constitutional struggle.

15. The course that best meets these objectives is Option a, but in recent years we have moved from a to e. This has dangerously exposed the DCI, and we are now trying to return to b. A return to a is unrealistic, e has been found wanting and f and g are even more unacceptable to the Executive. Given present Congressional attitudes b may also be unattainable. Congress is unlikely to accept, even tacitly, the "privileged intelligence concept without a major fight unless we are willing to pay a price. Option c therefore sweetens the pot for Congress, and d goes still further in that direction. We should therefore try for b, settle for c, and be willing if worst comes to worst to consider d.

Recommendations

16. In general it is not in our interest that this be a central issue or that Congress focus upon it. We should, however, continue our present effort quietly to retreat from Option e to Option b. We should take no other initiative in this matter, but should be prepared to educate the various Committees on the complexities of the issue should they raise it. We should be prepared to argue that certain intelligence is covered by executive privilege and should seek Presidential backing for such a position. Short of this, however, we should be prepared to be forthcoming at least as far as Option c.
17. If this becomes a major issue, consideration should be given to the issuance of an NSCID or Executive Order defining the DCI's responsibilities to Congress. Such an order would:
  - Assert the Executive's right to decide what Congress gets.
  - Establish that the issue extends beyond the DCI's authority and concerns his responsibility to the Executive.

--Provide the DCI with some protection should his service to Congress (within the terms of his instructions) place him once more in the middle.